

44 A.D.3d 879, 843 N.Y.S.2d 671, 2007 N.Y. Slip Op. 07869
(Cite as: 44 A.D.3d 879, 843 N.Y.S.2d 671)

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Supreme Court, Appellate Division, Second Department, New York.
The PEOPLE, etc., respondent,
v.
Raymond MONTEFUSCO, appellant.
Oct. 16, 2007.

Background: Defendant was convicted, after jury trial in the County Court, Suffolk County, Hudson, J., of three counts of third-degree burglary, three counts of second-degree offense of receiving reward for official misconduct, six counts of official misconduct, and three counts of fourth-degree criminal facilitation. Defendant appealed.

Holdings: The Supreme Court, Appellate Division, held that:

- (1) accomplice testimony, regarding burglary of grocery store, was sufficiently corroborated, but
- (2) accomplice testimony, regarding burglaries of vehicle oil-change business and a bar, was not sufficiently corroborated.

Affirmed as modified.

West Headnotes

[1] Criminal Law 110 ⚔511.1(4)

110 Criminal Law
110XVII Evidence
110XVII(S) Testimony of Accomplices and Codefendants
110XVII(S)2 Corroboration
110k511 Sufficiency
110k511.1 In General
110k511.1(4) k. Scope of Corroboration in General. [Most Cited Cases](#)

Criminal Law 110 ⚔511.2

110 Criminal Law
110XVII Evidence

110XVII(S) Testimony of Accomplices and Codefendants

110XVII(S)2 Corroboration

110k511 Sufficiency

110k511.2 k. Connecting Accused with Crime. [Most Cited Cases](#)

Although the corroborative evidence, with respect to accomplice testimony, need not establish each element of the offense, it must tend to connect the defendant to the crime charged. [McKinney's CPL § 60.22\(1\)](#).

[2] Criminal Law 110 ⚔511.2

110 Criminal Law

110XVII Evidence

110XVII(S) Testimony of Accomplices and Codefendants

110XVII(S)2 Corroboration

110k511 Sufficiency

110k511.2 k. Connecting Accused with Crime. [Most Cited Cases](#)

For purposes of requirement of corroboration of accomplice testimony, matters in themselves of seeming indifference may so harmonize with the accomplice's narrative as to have a tendency to furnish the necessary connection between the defendant and the crime. [McKinney's CPL § 60.22\(1\)](#).

[3] Criminal Law 110 ⚔741(5)

110 Criminal Law

110XX Trial

110XX(F) Province of Court and Jury in General

110k733 Questions of Law or of Fact

110k741 Weight and Sufficiency of Evidence in General

110k741(5) k. Corroboration of Accomplices. [Most Cited Cases](#)

So long as the statutory minimum is met, with respect to corroboration of accomplice testimony, it is for the jury to decide whether the corroboration satisfies them that the accomplice is telling the truth.

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[McKinney's CPL § 60.22\(1\)](#).

[4] Criminal Law 110  **511.9**

110 Criminal Law
 110XVII Evidence
 110XVII(S) Testimony of Accomplices and Codefendants
 110XVII(S)2 Corroboration
 110k511 Sufficiency
 110k511.9 k. Testimony of Third Persons. **Most Cited Cases**

Accomplice testimony, in prosecution for burglary of grocery store, was sufficiently corroborated at trial by testimony from nonaccomplice witnesses establishing that defendant, who was a county police officer, was near the scene at time of burglary, that he took it upon himself to respond to several reports of burglar alarms being triggered at premises, that he falsely reported that the location was secure, and that he discouraged other police units from responding. [McKinney's CPL § 60.22 \(1\)](#).


[5] Criminal Law 110  **511.4**

110 Criminal Law
 110XVII Evidence
 110XVII(S) Testimony of Accomplices and Codefendants
 110XVII(S)2 Corroboration
 110k511 Sufficiency
 110k511.4 k. Competency and Sufficiency of Particular Facts in General. **Most Cited Cases**

Criminal Law 110  **511.9**

110 Criminal Law
 110XVII Evidence
 110XVII(S) Testimony of Accomplices and Codefendants
 110XVII(S)2 Corroboration
 110k511 Sufficiency
 110k511.9 k. Testimony of Third Persons. **Most Cited Cases**

Accomplice testimony, in prosecution for burglaries of vehicle oil-change business and a bar, was not sufficiently corroborated by testimony of two eyewitnesses that they saw two unidentified individuals inside the oil-change business on night it was burglarized and by evidence that defendant owned same model of vehicle that one of the accomplices allegedly saw him driving on night of burglary of bar. [McKinney's CPL § 60.22\(1\)](#).

[6] Criminal Law 110  **511.1(9)**

110 Criminal Law
 110XVII Evidence
 110XVII(S) Testimony of Accomplices and Codefendants
 110XVII(S)2 Corroboration
 110k511 Sufficiency
 110k511.1 In General
 110k511.1(6) Particular Offenses

110k511.1(9) k. Larceny; Burglary; Robbery; Receiving Stolen Goods. **Most Cited Cases**

Evidence which was sufficient to corroborate accomplice testimony with respect to defendant's participation in burglary of grocery store was insufficient to corroborate accomplice testimony regarding defendant's participation in burglaries of vehicle oil-change business and a bar; burglaries of oil-change business and bar occurred about nine months after burglary of grocery store, and alleged participants in burglaries were different. [McKinney's CPL § 60.22\(1\)](#).

[7] Criminal Law 110  **814(17)**

110 Criminal Law
 110XX Trial
 110XX(G) Instructions: Necessity, Requisites, and Sufficiency
 110k814 Application of Instructions to Case
 110k814(17) k. Circumstantial Evidence. **Most Cited Cases**
 No special charge on circumstantial evidence was

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required, in prosecution for burglary, where the case was not wholly circumstantial.

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Thomas J. Spota, District Attorney, Riverhead, N.Y. (Michael Blakey and Anne E. Oh of counsel), for respondent.

ROBERT W. SCHMIDT, J.P., GLORIA GOLDSTEIN, PETER B. SKELOS, and STEVEN W. FISHER, JJ.

*879 Appeal by the defendant from a judgment of the County Court, Suffolk County (Hudson, J.), rendered June 6, 2006, convicting him of burglary in the third degree (three counts), receiving reward for official misconduct in the second degree (three counts), official misconduct (six counts), and criminal facilitation in the fourth degree (three counts), upon a jury verdict, and imposing sentence.

ORDERED that the judgment is modified, on the law, by vacating the convictions on counts six through fifteen of the indictment, vacating the sentences imposed thereon, and dismissing those counts of the indictment; as so modified, the judgment is affirmed.

The defendant, a former Suffolk County Police Officer, was convicted, after a jury trial, of burglary in the third degree and related offenses in connection with the November 1999 burglary of a King Kullen supermarket, and two additional burglaries *880 and related charges involving incidents that occurred in July 2000 at a Jiffy Lube store and at a bar called Parsnips. In each case, the crimes allegedly were committed by a number of individuals acting in concert with the defendant, who, in each instance, acted primarily as a lookout.

[1][2][3] The defendant contends that the accomplice testimony upon which the People relied to establish his participation in the three burglaries was

insufficiently corroborated and, therefore, the evidence was legally insufficient to support the convictions. In New York, “[a] defendant may not be convicted of any offense upon the testimony of an accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of such offense” (CPL 60.22[1]). Although the corroborative evidence need not establish each element of the offense, it must tend to connect the defendant to the crime charged (see *People v. Besser*, 96 N.Y.2d 136, 143-144, 726 N.Y.S.2d 48, 749 N.E.2d 727; *People v. Breland*, 83 N.Y.2d 286, 292-293, 609 N.Y.S.2d 571, 631 N.E.2d 577; *People v. Steinberg*, 79 N.Y.2d 673, 683, 584 N.Y.S.2d 770, 595 N.E.2d 845; *People v. Robinson*, 297 A.D.2d 296, 297, 746 N.Y.S.2d 31). “ ‘Matters in themselves of seeming indifference may so harmonize with the accomplice’s narrative as to have a tendency to furnish the necessary connection’ ” (*673 *People v. Morhouse*, 21 N.Y.2d 66, 74, 286 N.Y.S.2d 657, 233 N.E.2d 705, quoting *People v. Dixon*, 231 N.Y. 111, 116-117, 131 N.E. 752). “So long as the statutory minimum is met, it is for the jury to decide whether the corroboration satisfies them that the accomplice is telling the truth” (*People v. Steinberg*, 79 N.Y.2d at 683, 584 N.Y.S.2d 770, 595 N.E.2d 845; see *People v. Robinson*, 297 A.D.2d at 297, 746 N.Y.S.2d 31).

[4] Contrary to the defendant’s contention, the accomplice testimony regarding the King Kullen burglary was sufficiently corroborated at the trial by testimony from nonaccomplice witnesses establishing, inter alia, that the defendant was near the scene at the time of the burglary, that he took it upon himself to respond to several reports of burglar alarms being triggered at the premises, that he falsely reported that the location was secure, and that he discouraged other police units from responding. There was also independent evidence that one of the accomplices was a friend of his and the co-owner of a business that had paid him money (see CPL 60.22). Thus, we find that the verdict of guilt on counts one through five of the indictment,

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charging the burglary of the King Kullen supermarket and related crimes, is supported by legally sufficient evidence (see *People v. Forino*, 39 A.D.3d 664, 833 N.Y.S.2d 603, *lv. denied* 9 N.Y.3d 865, 840 N.Y.S.2d 894, 872 N.E.2d 1200; *People v. Maelia*, 37 A.D.3d 619, 829 N.Y.S.2d 672; *People v. Watkins*, 5 A.D.3d 510, 772 N.Y.S.2d 601). Moreover, upon the exercise of our factual review power (see CPL 470.15[5]), we are satisfied that the *881 verdict of guilt on those counts was not against the weight of the evidence (see *People v. Romero*, 7 N.Y.3d 633, 826 N.Y.S.2d 163, 859 N.E.2d 902).

[5][6] With respect to the Jiffy Lube and Parsnip burglaries, however, we agree with the defendant's contention that the proof offered to corroborate the accomplice testimony fell short of the statutory minimum (see CPL 60.22) and, therefore, the convictions relating to those two incidents were not supported by legally sufficient evidence. The fact that two eyewitnesses saw two unidentified individuals inside the Jiffy Lube store on the night it was burglarized, and evidence that the defendant owned a Nissan Xterra, which was the same type of car one of the accomplices allegedly saw him driving on the night of the Parsnips burglary, are insufficient, without more, to connect the defendant to those crimes. Moreover, in light of the time span between the King Kullen burglary and the two other charged burglaries, and the different alleged participants, the corroborative evidence sufficient to support the convictions for the crimes committed at the King Kullen supermarket cannot serve, standing alone, to support the convictions arising out of the other two incidents (*cf. People v. Glanda*, 5 A.D.3d 945, 952, 774 N.Y.S.2d 576; *People v. Spencer*, 272 A.D.2d 682, 684, 708 N.Y.S.2d 488). Accordingly, the defendant's convictions under counts six through fifteen of the indictment must be vacated and those counts dismissed (see *People v. Robinson*, 297 A.D.2d 296, 746 N.Y.S.2d 31).

[7] The defendant's challenge to the court's circumstantial evidence charge, as well as his claims of

prosecutorial misconduct, are unpreserved for appellate review (see CPL 470.05[2]), and, in any event, do not warrant reversal. We note that inasmuch as this was not a wholly circumstantial case, no special charge on circumstantial evidence was required (see **674*People v. Daddona*, 81 N.Y.2d 990, 599 N.Y.S.2d 530, 615 N.E.2d 1014; *People v. Wiggins*, 31 A.D.3d 584, 817 N.Y.S.2d 670).

The defendant's remaining contentions are without merit.

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